SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 19832
S.C. 19833

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, ET AL

V.

BUSHMASTER FIREARMS INTERNATIONAL, LLC, A/K/A, ET AL

BRIEF OF PLAINTIFFS-APPELLANTS

TO BE ARGUED BY:

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PROLOGUE

1962: Combat Evaluation of the AR-15

> **The troopers have a great amount of respect for the AR-15. If the weapon were adopted [by the military], there would be a tremendous psychological uplift in the individual soldier's belief in his ability to shoot and kill.[1]**

2009: Form S-1 Registration Statement of Freedom Group, Inc. d/b/a/ Remington Outdoor Company, Inc.

> **[T]he continued adoption of the modern sporting rifle [AR-15][2] has led to increased growth in the long gun market, especially with a younger demographic of users and those who like to customize or upgrade their firearms. We view this current increase in demand as having significant long-term benefits.[3]**

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[1] A403, Report of Task No. 13A: Test of Armalite Rifle, AR-15, Advanced Research Projects Agency, Defense Documentation Center for Scientific and Technical Information, Annex "A" – Details of the Combat Evaluation of the AR-15, p.6 (Aug. 20, 1962) (declassified 1974).

[2] "Modern sporting rifle" is the Remington Defendants' euphemism for the AR-15 assault rifle. It is employed judiciously, reserved for audiences like the SEC and the courts. In marketing materials, the "modern sporting rifle" becomes a "military-proven" "AR15-Type/M16-Type" rifle. *See* A74-A76, First Amended Complaint ("FAC") ¶¶ 75-92.

[3] A407, Form S-1 Registration Statement of Freedom Group, Inc. d/b/a/ Remington Outdoor Company, Inc., as filed with the Securities and Exchange Commission (Oct. 20, 2009), p. 5.

I. INTRODUCTION

Half a century ago, soldiers in Vietnam bore witness to a feat of human engineering – a weapon of war so powerful, so accurate, and so destructive to the human body, it vanquished the need for skilled hands or forgiving terrain. That weapon was known then as it is now: the AR-15. The AR-15 is not a "sporting rifle," modern or otherwise. It is not a weapon that is merely *capable* of assault or *superior* for assault. It is a weapon designed for those with the awesome power – and responsibility – to inflict mass casualties in combat. Every detail of this machine serves the same end: to ensure that whoever wields it will achieve more wounds, of greater severity, in more victims, in less time, *every time.* Over the last several decades, scores of Americans – not soldiers, but *civilians* – have witnessed firsthand the effects of that mechanical prowess – not on battlefields, but in malls, movie theaters, places of worship, and schools.

The notion that what happened at Sandy Hook on December 14, 2012 was unimaginable is a lie. Long before December 14, 2012, the national vernacular had expanded to include "mass shooting," "school shooting," "active shooter," "lone gunman," and "lockdown." Long before December 14, 2012, educators were rehearsing "active shooter" protocols, children were being drilled on where and how to hide, and police were working to minimize response times. Sandy Hook was simply gratuitous, senseless proof of what was already known: preparation is no match for an AR-15. There is no protocol that will stop a hail of 30 bullets traveling at 4,000 feet per second, each one packing enough destructive force to turn a flesh wound into a fatality. And that's just the first several seconds, until the shooter reloads.

Remington Arms Company – the world's largest dealer of "civilian" AR-15s – lived through this bloodshed. But Remington did not question the wisdom of selling the military's superlative combat weapon to civilians. Nor did Remington take issue with the fact that young men consistently, routinely – and more often than not, *legally* – were able to gain access to AR-15s and unleash them in our communities. Where others feared the catastrophic risk posed by these weapons, particularly in the hands of unstable young men, Remington saw a different problem: *insufficient civilian demand for the AR-15*.

Its solution was to develop a new market among a "younger demographic of users," and to do so by employing a targeted marketing campaign linking the AR-15 to macho vigilantism and military-style insurrection. That campaign, as alleged by plaintiffs, underscored the AR-15's battlefield prowess and encouraged this younger demographic to harness the AR-15's military virtues in their own "missions," against their own "forces of opposition." Remington's intuition was astute; until the shooting at Sandy Hook Elementary School, Remington credited this "younger demographic" for driving demand for the AR-15. The Camfour and Riverview Defendants, with knowledge of Remington's campaign – and undoubtedly pleased with its positive impact on sales – acted as middlemen in funneling the weapon to Remington's coveted demographic: video-game playing, military-obsessed 18 year olds like Adam Lanza.

That conduct gives rise to two well-recognized causes of action in Connecticut, on which plaintiffs rely: (1) the common law tort of negligent entrustment, and (2) violations of the Connecticut Unfair Trade Practices Act (CUTPA). Both of these causes of action are *explicitly preserved* according to the letter of the Protection of Lawful Commerce in Arms Act (PLCAA). *See* 15 U.S. § 7903(5)(ii) (negligent entrustment) & (iii) (violation of a state

statute “applicable to the sale or marketing” of firearms). As set forth more fully below, these claims are grounded in fundamental principles of common and statutory law. The trial court erred in deciding the reasonableness of the defendants’ conduct as a matter of law, and in holding that plaintiffs did not have standing to bring CUTPA claims.

Plaintiffs, ten families whose lives were shattered on December 14, 2012, do not seek to hold defendants liable simply for selling a weapon used by a young school shooter; they seek to hold defendants liable for their o*wn, specific wrongdoing*. Plaintiffs ask for nothing more than the opportunity to prove their case to a jury.

II. THE FIRST AMENDED COMPLAINT

A. The AR-15: A Weapon of War in Civilian Hands

The AR-15 is an instrument of war. Designed for the battlefield, it was engineered to meet the exigencies of close-range, highly mobile combat. A72, FAC ¶¶ 48-50. After World War II, the U.S. Army's Operations Research Office undertook an exhaustive study of millions of casualty reports in their pursuit of the ideal combat weapon. *Id.* ¶ 48. Their findings led the Army to develop specifications for a new service weapon: a lightweight rifle with a large, quickly replaceable magazine that would expel ammunition rapidly and with enough velocity to penetrate body armor and steel helmets. *Id.* ¶ 49. The AR-15 delivered. Troops field-testing the weapon reported instantaneous deaths, as well as amputations, decapitations, and massive body wounds. *Id*. ¶ 51. Lightweight, air-cooled, gas-operated, and magazine-fed, the AR-15's capacity for rapid fire with limited recoil meant its killing power did not require careful aim or ideal combat conditions. *Id.* ¶ 50. It was, in short, the perfect piece of military hardware. The AR-15 was adopted by the military as its standard-issue service rifle and renamed the M16. *Id.* ¶ 51.

All AR-15s, whether designated an M16 or, in this case, a Bushmaster XM15-E2S, are built for mass casualty assaults. Semiautomatic fire unleashes a torrent of bullets in a matter of seconds;[4] large-capacity magazines allow for prolonged assaults;[5] and powerful

[4] The M16 is capable of firing in fully automatic mode, but the United States Army considers semiautomatic fire – which can empty a 30-round magazine in five to ten seconds – more effective than automatic fire in most combat situations. A74, FAC ¶¶ 68-69. "Civilian" semiautomatic rifles like the XM15-E2S, therefore, are capable of the same rapid fire that the Army deems optimal for inflicting casualties. *Id.* ¶ 70.

[5] Large-capacity magazines, which by definition hold more than ten rounds and usually hold 30, were first designed and produced for the military in order to increase the firepower of U.S. infantry by minimizing time spent reloading. A73-A74, FAC ¶¶ 64-65.

muzzle velocity makes each hit catastrophic.[6] A73-A74, FAC ¶¶ 56-74. The combined effect of these mechanical features is more wounds, of greater severity, in more victims, in less time. A74, *id.* ¶¶ 72-73. This unparalleled capacity to kill is why the AR-15 has endured as the United States military's weapon of choice for more than 50 years. *Id.* ¶ 74.

When the AR-15 is sold to the military – and more recently, to law enforcement – it enters a highly regulated environment in which its use is both justified and strictly controlled. The military, in particular, has developed extensive protocols governing

[6] The velocity of a bullet on impact is the main determinant of its destructive capacity. A73, FAC ¶ 58. According to a study by physicians who performed autopsies on soldiers killed by gunfire in Iraq, rounds with a velocity exceeding 2,500 feet per second cause a shockwave to pass through the body that results in catastrophic injuries, even in areas remote to the direct wound. *Id.* ¶ 61. The Bushmaster XM15-E2S propels ammunition at *4,000 feet per second*. *Id.* ¶ 62.

training,[7] storage,[8] safety during instruction and combat,[9] and the mental health of soldiers and officers.[10] A78-A80, FAC ¶¶ 116-38.

When the AR-15 is sold to civilians, the calculus changes radically. The weapon's functional virtues, so well adapted to the battlefield, pose catastrophic risks to public safety. A76, FAC ¶ 93; A87, A88, A90, FAC Count I, II, III ¶ 218. The capacity to inflict more wounds, of greater severity, in more victims, in less time, is unnecessary for – and

[7] In the Army, soldiers are trained extensively on the use of the M16. This includes mastery of the weapon's mechanics and five phases of instruction on rifle marksmanship. A79, FAC ¶¶ 130-32. After more than 100 hours of training, solders undergo a formal assessment of their performance and readiness to use the weapon in combat. *Id.* ¶ 135-36.

[8] Assault rifles are stored in secure weapons rooms on military bases and must be signed out to establish a chain of custody. A79, FAC ¶ 128. Soldiers cannot leave their assault rifles unattended under any circumstances. *Id.* ¶ 123. If an assault rifle cannot be accounted for, the Army will place an entire base or installation on lockdown until the weapon is located. *Id.* ¶ 124.

[9] M16s are issued to soldiers for instruction, training, exercises, and combat only. A78, FAC ¶ 119. Assault rifles must be kept in safety mode when not in use. *Id.* ¶ 122. During live-fire applications, ammunition is released to troops only when they are on the firing line. A79, *id.* ¶ 134. Soldiers are trained to control the weapon's firepower and minimize the risk of unintentional injury. *Id.* ¶ 129; *see also* A76, *id.* ¶ 100 (The military has concluded that use of the M16 in close quarters greatly increases the risk of both "friendly fire" and noncombatant casualties.).

[10] Standardized medical fitness standards prohibit enlistment or retention in the Armed Forces for anyone who suffers from major depression, bipolar disorder, affective psychoses, or a history of symptoms consistent with mental instability that impairs school, social, or work efficiency. A78, FAC ¶ 117. Military commanders are charged with identifying "hazards" to safety that arise from soldiers' use of the M16, including health or behavioral concerns. A80, *id.* ¶ 137. If warranted, military leadership will restrict a soldier's access to the M16. *Id.* ¶ 138.

inconsistent with – civilian firearm use.[11] Except, of course, for mass shootings, where the AR-15 reigns supreme. A68, FAC ¶ 7; A82, *id.* ¶ 165.

In the civilian environment, very little stands in the way of those who would use the AR-15 for its intended purpose – but against innocent Americans, rather than enemy troops. In striking contrast to the restrictions and regulations imposed by the military or by law enforcement agencies, AR-15s enter civilian life through an impotent regulatory scheme that deems 18 year olds fit to purchase military weapons, A80, FAC ¶ 146; allows buyers to skirt background checks for "informal" sales, A81, *id.* ¶¶ 156-57;[12] permits family members to share AR-15s freely – even with children as young as 14 or 16, A80-A81, *id.* ¶¶ 157-58, 147, 152 – and fails to mandate safety training or the secure storage of firearms in the home, A81, *id.* ¶¶ 150, 153-55.

Time and again, mentally unstable young men, criminals, and more recently, terrorists, have demonstrated the hazards of relying on this porous system to protect the public from the catastrophic risks associated with the AR-15. Indeed, long before

[11] The AR-15's overwhelming firepower is ill suited for both home defense and hunting. A76, FAC ¶¶ 98-99 (muzzle velocity and rate of semiautomatic fire create significant risk of "over-penetration" in the home, where bullets breach walls and doors); A77-A78, *id.* ¶¶ 105-115 (The Bureau of Alcohol, Tobacco, Firearms and Explosives [ATF] has concluded that assault rifles like the XM15-E2S serve a purpose "in combat and crime" but serve no sporting or hunting purpose.).

[12] Even among regulated sales by licensed dealers, oversight is grossly insufficient – a fact known to manufacturers and wholesalers when they place AR-15s into the distribution chain. In 2009, ATF inspected less than 10% of all licensed firearm dealers; on average, dealers are inspected only once a decade. A81, FAC ¶ 163. Between 2004 and 2011, nearly 84,000 long guns (a category that includes AR-15s) were found to be "missing" from dealers' inventories. *Id.* ¶ 161. In 2010 – the year the Bushmaster XM15-E2S was sold by the defendants – ATF uncovered violations at more than half of the 10,500 dealers it inspected, but only 71 dealers had their license revoked or were denied a renewal. A82, *id.* ¶ 164.

December 14, 2012, Americans had grown accustomed to reports of mass and indiscriminate murder with AR-15s – in department stores, fast food restaurants, offices, homecoming parties, movie theaters, and schools. A82, FAC ¶¶ 168-69. Long before December 14, 2012, Americans had already mourned the deaths of elementary school children, high school children, and college students who found themselves on the wrong end of an AR-15. *Id.* ¶ 170. In short, terms like "mass shooting," "school shooting," "active shooter," "lone gunman," and "lockdown" had long since entered the public vernacular.

B. Marketing the Assaultive Qualities of a Weapon of War to a Younger Demographic of Users

In the midst of this bloodshed, the Remington Defendants – already the industry leader in civilian sales of AR-15s, A73, FAC ¶ 54 – embarked on an astonishing course of conduct. Not only did they continue to sell the AR-15 without regard for its track record in facilitating mass murder, A82, *id.* ¶¶ 167-73; they decided to market the AR-15 *as a weapon of assaultive violence*. A74-A76, *id.* ¶¶ 75-92. This was a calculated choice. Each Bushmaster rifle that Remington sells is explicitly linked, through marketing, to a particular type of firearm use. Thus, Remington offers the .450 rifle for "all North American big game," A75, *id.* ¶ 89; the "Predator Rifle," which is described as "the ultimate predator-hunting carry rifle," A76, *id.* ¶ 90; the "Varminter Rifle," "built specifically for varmint hunters," *id.* ¶ 91; and the "Competition Rifle," *id.* ¶ 92. Moreover, because lawful activities like hunting and recreational shooting do not require overwhelming firepower, Remington considers five- or ten-round magazines to be "standard" for these rifles. A75-A76, *id.* ¶¶ 88-92.

With equal clarity, Remington marketed the Bushmaster XM15-E2S to a class of people *uninterested* in hunting or target shooting. A class likely to be familiar with the AR-

15 from first-person shooter games – and drawn to its superiority in racking up virtual kills. A75, *id.* ¶¶ 84-85. A class likely to be attracted to the AR-15 *because of* its militaristic and assaultive qualities. A74, *id.* ¶ 76. In short, a new "younger demographic of users." A82, *id.* ¶ 175. Ignoring the body count from mass shootings past – and evidently unconcerned that this young demographic might be susceptible to suggestive marketing or prone to rash behavior – Remington went all in.[13]

Its marketing campaign capitalized on the AR-15's military provenance. It touted the XM15-E2S as the same weapon carried by elite military units – Special Forces, SEALs, Green Berets, and Army Rangers – and equated its physical characteristics and appearance with "M16-Type" and "military-type" weapons. A74-A75, FAC ¶¶ 77-78. Remington's product catalogues, using images of soldiers moving through jungles on patrol, extolled the gun's "military-proven performance" and declared it "the ultimate combat weapons system." A75, *id.* ¶¶ 80-82. And Remington didn't stop there; it encouraged this "younger demographic" to harness the AR-15's battlefield prowess in their *own endeavors*, promoting the weapon as "the uncompromising choice when you demand a rifle as mission-adaptable as you are," and promising that it "delivers" when "you need to perform under pressure." *Id.* ¶¶ 79-80. (Remington's marketing does not explain what type of high-pressure "mission" requires young men to discharge an AR-15 in civilian life.) Remington leveraged its advertising with astute product placement in highly realistic first-person shooter games – played overwhelmingly by young men – that "arm" players with AR-15s, teach assaultive weapon techniques like taped reloads, and reward them for "head shots"

[13] The Camfour and Riverview Defendants, with knowledge of this campaign, acted as middlemen. A83, FAC ¶¶ 178, 182; A88-A89, *id.* Count II ¶¶ 213, 223-24; A89-A90, *id.* Count III ¶¶ 213, 223-25.

and “kill streaks.” *Id.* ¶ 85. And Remington exploited the fantasy of an all-conquering lone gunman: “Forces of opposition, bow down. You are single-handedly outnumbered.” *Id.* ¶ 83.

In this deliberate fashion, Remington reached its desired demographic: young men like Adam Lanza. Plaintiffs allege that Adam was a devoted player of first-person shooter games and partial to the AR-15 for committing virtual violence. A83, FAC ¶ 184. He was obsessed with the military and aspired to join the elite Army Rangers unit. *Id.* ¶ 183. But when Adam turned eighteen on April 22, 2010, he did not enlist; rather than submit to rigorous mental health screening he almost certainly would have failed – and in any event uninterested in strict military oversight – Adam Lanza chose a simpler path: unfettered access to the Bushmaster XM15-E2S in his own home. *Id.* ¶ 186. Plaintiffs allege that Nancy Lanza purchased the Bushmaster for her son, likely as an eighteenth birthday present. *Id.* ¶¶ 182-86. That same year, Remington boasted in public filings that AR-15 sales were up – thanks to demand from a “younger demographic of users.” A82, *id.* ¶ 175.

On the morning of December 14, 2012, Adam selected the weaponry he would use in his assault on Sandy Hook Elementary School. Available options included, in addition to the Bushmaster XM15-E2S, at least one shotgun, two bolt-action rifles (one of which he used to kill his mother), three handguns (one of which he used to kill himself), and three samurai swords. A83, FAC ¶ 188. From this extensive arsenal, Adam selected the “uncompromising choice” for his “mission:” the Bushmaster XM15-E2S. His choice was anything but random; he chose the Bushmaster for its efficiency in inflicting mass casualties, as well as for its marketed association with military combat. A84, *id.* ¶¶ 189-90.

Shortly after 9:30 a.m., Adam Lanza used his Bushmaster XM15-E2S to blast through the doors of Sandy Hook Elementary School. A85, FAC ¶ 201. He carried multiple 30-round magazines, several of which he had taped together to allow for faster reload. A83, *id.* ¶ 187. Mary Sherlach, a child psychologist, was in a meeting with the school's principal when the first shots were fired; when they went to investigate, both were killed with the Bushmaster XM15-E2S. A85, *id.* ¶ 202. Lead teacher Natalie Hammond and another staff member were shot with the Bushmaster XM15-E2S and wounded. *Id.*

Adam Lanza then approached two first-grade classrooms, Classroom 8 and Classroom 10. In Classroom 8, he used the Bushmaster XM15-E2S to kill 15 children and 2 adults, including seven-year-old Daniel Barden, six-year-olds Benjamin Wheeler and Noah Pozner, 29-year-old behavioral therapist Rachel D'Avino, and 30-year-old substitute teacher Lauren Rousseau. A85, FAC ¶ 204. In Classroom 10, Adam Lanza used the Bushmaster XM15-E2S to kill 5 children and 2 adults, including Dylan Hockley and Jesse Lewis, both six years old, and their 27-year-old teacher Victoria Soto. *Id.* ¶ 205. Nine children from Classroom 10 were able to escape when Adam Lanza paused to reload the Bushmaster with another 30-round magazine. *Id.* ¶ 206.

The first 9-1-1 call from Sandy Hook Elementary School was made at 9:35 a.m.; by 9:40 a.m., the assault was complete. A86, FAC ¶ 207. In five minutes, 154 bullets had been fired by the Bushmaster XM15-E2S, and 26 lives had been claimed. *Id.* ¶¶ 201, 208-12.

Based on these allegations and others set forth in the First Amended Complaint, plaintiffs assert common law negligent entrustment claims and claims for violation of CUTPA.

III. THE FIRST AMENDED COMPLAINT MUST BE READ BROADLY AND REALISTICALLY

The questions before the Court arise from the striking of a complaint. Accordingly, review is plenary. *Sullivan v. Lake Compounce Theme Park*, 277 Conn. 113, 117 (2006). In assessing the sufficiency of the complaint, "[a]ll well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted . . . [and] pleadings must be construed broadly and realistically, rather than narrowly and technically." *Gazo v. City of Stamford*, 255 Conn. 245, 260 (2001) (internal citation and quotation marks omitted).

Mixed questions of law and fact, such as those raised by plaintiffs' negligent entrustment claims, are not generally amenable to motions to strike, because such allegations should be permitted to be developed through discovery. *See Macomber v. Travelers Prop. & Cas. Corp*, 261 Conn. 620, 636 (2002) ("[Q]uestions of mixed fact and law…require[d] a more detailed factual matrix than [was] disclosed by the plaintiffs' allegations" and thus could not "be answered satisfactorily on [a] motion to strike"). Issues central to a negligence claim – such as reasonableness and proximate cause – are quintessential mixed questions and rarely decided on the pleadings. *See Spencer v. Good Earth Restaurant Corp*., 164 Conn. 194, 199 (1972) ("Issues of negligence are ordinarily not susceptible of summary adjudication but should be resolved by trial in the ordinary manner."); *Marley v. New England Transp. Co.*, 133 Conn. 586, 591 (1947) ("[A] conclusion of negligence is ordinarily one of mixed law and fact. . . . It becomes a conclusion of law only when the mind of a fair and reasonable man could reach only one conclusion.") (citations omitted).

IV. PLAINTIFFS STATE COMMON LAW NEGLIGENT ENTRUSTMENT CLAIMS

The doctrine of negligent entrustment is a creature of the common law. It is based on the simple proposition that relinquishing control over a dangerous chattel gives rise to a duty to consider attendant risks and avoid harm to foreseeable victims. The First Amended Complaint alleges that Remington, looking to expand the civilian market for a singularly lethal military weapon, employed a marketing campaign extoling assaultive violence *with the intent to attract* a "younger demographic of users" to the AR-15. As set forth in Part IV.B., below, the nature of that conduct – deemed true at this stage – links Remington's sale (as well as Camfour's and Riverview's) to Adam Lanza's use of the Bushmaster XM15-E2S. Moreover, plaintiffs allege that defendants ignored myriad risks associated with the mechanical power of the weapon, the porous environment into which it was sold, and mounting evidence that the AR-15 had become the weapon of choice for lone shooters looking to inflict maximum casualties. Those allegations – which must also be deemed true – create factual questions as to whether the defendants' entrustment of the Bushmaster XM15-E2S was reasonable, and whether the harm to plaintiffs was foreseeable to the defendants. *See* Part IV.C.&D, *infra*.

The trial court, disregarding the factual nature of those determinations, struck plaintiffs' claims because the XM15-E2S is a "legal product" that the "general public" is "lawfully entitled to purchase." A157, MOD at 25. As set forth below in Part IV.E., that conclusion erroneously conflates a *legal* entrustment with a *reasonable* entrustment. It is axiomatic that "[n]egligence may consist not only in the doing of unlawful acts, but also in the negligent doing of acts otherwise lawful." *Hill v. Fairhaven & W. R. Co.*, 75 Conn. 177 (1902). Moreover, the suggestion that plaintiffs' claims amount to "labeling as a misuse the

sale of a legal product," A157, MOD at 25, ignores the specific and detailed allegations in the First Amended Complaint concerning the extraordinary and foreseeable risk created by the defendants' conduct. The Court should reverse.

A. The Elements of Negligent Entrustment

Under Connecticut common law, one who sells a dangerous instrument must do so prudently. Section 390 of the Restatement (Second) of Torts imposes negligent entrustment liability on one who "supplies . . . a chattel for the use of another whom the supplier knows or has reason to know to be likely . . . to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use." A264, Restatement (Second) of Torts § 390 (1965). This doctrine takes the world as it is, not as it should be. It is "based upon the rule . . . that the actor may not assume that human beings will conduct themselves properly if the facts which are known or should be known to him should make him realize that they are unlikely to do so." *Id.* cmt. b. Connecticut recognized this cause of action in 1933, holding that the owner of an automobile might be liable for another person's negligence if he entrusted it under circumstances where he "ought reasonably to anticipate the likelihood of injury to others." *Greeley v. Cunningham*, 116 Conn. 515, 165 A. 678, 680 (1933).[14]

[14] The Restatement (Second) of Torts was not yet published when *Greeley* was decided, and neither this Court not the Appellate Court has substantively discussed negligent entrustment law since. As such, there is no Connecticut appellate decision formally adopting Section 390. A bevy of superior courts note that *Greeley* relied on the same essential elements as Section 390, and so reason that Connecticut accepts the Restatement approach. *See, e.g.*, *Short v. Ross*, 2013 WL 1111820, at *5, A394 ("[A]s long recognized by the decisions of the Superior Court, *Greeley* virtually adopted the approach provided by the Restatement."). Consistent with *Greeley*, the Court should take this opportunity to clarify that Connecticut accepts Section 390. "[A]pplicable Restatements of the Law. . . have served as authoritative support for many of our holdings." *Ackerman v. Sobol Family P'ship, LLP*, 298 Conn. 495, 511 (2010). In particular, the Court has

A prima facie negligent entrustment claim requires that three elements be pled:

(1) Entrustment – the defendant relinquished control over a physical object by "suppl[ying]" it "for the use of another";

(2) Knowledge of Unreasonable Risk – the defendant "kn[ew] or "ha[d] reason to know" that the entrustment created an "unreasonable risk of physical harm"; and

(3) Foreseeability – the people harmed were those that "the supplier should expect to share in or be endangered by [the chattel's] use."

A264, Rest. (2d) § 390. As with negligence law generally, negligent entrustment hinges on factual disputes that are rarely amenable to resolution as a matter of law.[15] The First Amended Complaint alleges ample facts in support of each of these elements.

B. The First Amended Complaint Adequately Alleges Entrustments

The first element of a negligent entrustment claim is the entrustment: the defendant's decision to relinquish control over a physical object and "supply" it "for the use of another." A264, Rest. (2d) § 390. The common law does not require that the entrustment occur in a particular fashion. As noted in Section 390, liability for negligent

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frequently recognized and relied on the Restatement (Second) of Torts as appropriate guides to the development of Connecticut's common law. *See, e.g. McDermott v. State*, 316 Conn. 601, 610 (2015) (Rest. (2d) Torts § 295A, cmt. c); *Doe v. Saint Francis Hosp. & Med. Ctr.*, 309 Conn. 146, 175-84 (2013) (Rest. (2d) Torts §§ 302B, 449); *Vitanza v. Upjohn Co.*, 257 Conn. 365, 374-76 (2001) (Rest. (2d) Torts § 402A).

[15] In this vein, several state Supreme Courts have noted that "the negligent entrustment rule is nothing more than a particularized application of general tort principles." *Ransom v. City of Garden City*, 743 P.2d 70, 75 (Idaho 1987); *Shirley v. Glass*, 308 P.3d 1, 9 (Kan. 2013) (citing this rule as applied to firearms); *Moning v. Alfono*, 254 N.W.2d 759, 768 (Mich. 1977) ("The doctrine of negligent entrustment is not peculiar to automobiles but rather an ordinary application of general principles for determining whether a person's conduct was reasonable in light of the apparent risk."); *Casebolt v. Cowan*, 829 P.2d 352, 355-56 (Colo. 1992) ("[I]t is instructive to review general negligence principles in order to establish the context for recognition of the doctrine of negligent entrustment and the relationship of negligent entrustment to broader principles of liability for negligence.").

entrustment "applies to sellers, lessors, donors or lenders, and to all kinds of bailors, irrespective of whether the bailment is gratuitous or for a consideration," A264, Rest. (2d) § 390 cmt. a.,[16] and applies "irrespective of whether the chattel is to be used for the purposes of the supplier's business or for purposes which are otherwise to the supplier's advantage or, on the other hand, for purposes personal to those who are to use the chattel and of advantage only to them." *Id.*

The sale of a firearm is a form of entrustment. *See Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 325-26 (Mo. 2016) ("Any doubt regarding the applicability of section 390 in the context of a sale is resolved by comment (a) . . . . The fact that [defendants] supplied the firearm . . . through a sale does not preclude [plaintiff]'s negligent entrustment claim."). Each defendant in this case has acknowledged – consistent with plaintiffs' allegations, *see* A83, FAC ¶¶ 176, 178, 182 – that it sold the Bushmaster XM15-E2S. In evaluating a motion to strike, these allegations suffice to establish entrustment.

Defendants nevertheless argued below that plaintiffs' allegations should be disregarded because the Bushmaster was legally transferred between firearm dealers before it was used to inflict catastrophic harm. This argument is a red herring, diverting attention from the ultimate foreseeable use of the weapon when sold under these circumstances. The entrustments among the defendants do not sever liability because plaintiffs' allegations link the initial entrustment by Remington directly to Adam Lanza. If the crux of the alleged negligence was at the final point of sale – a careless decision by a

[16] Consistent with the Restatement mandate, Connecticut law has recognized a broad range of entrustments, including lending a car, renting a truck, selling a firearm, and allowing access to medication. *See Greeley*, 116 Conn. 515; *Short*, 2013 WL 1111820, A391-A401; *Kalina v. Kmart Corp.*, 1993 WL 307630, A337- A343; *Bernard v. Baitch*, 2011 WL 1411097, A295-A299.

Riverview store clerk, for example – a claim of negligent entrustment against Remington and Camfour would likely fail. But that is not – and has never been – the nature of plaintiffs' claims. To the contrary, the alleged negligence *originates* from Remington's conduct. That conduct includes not simply the questionable decision to continue selling the AR-15 to the public despite evidence of its devastating history of misuse by young men, but also Remington's concerted effort to *reach* those young men by promoting the AR-15 for use in personal "missions." The successive entrustments through Camfour and Riverview were simply the *method* by which Remington entrusted the Bushmaster XM15-E2S to members of its coveted "younger demographic." Thus, for pleading purposes, it is as if Remington directly entrusted the Bushmaster XM15-E2S to Adam Lanza.[17] The determination as to whether the entrustment was *reasonable* in light of what was known, or should have been known, is reserved for the trier of fact.

Two negligent entrustment decisions from Michigan and Massachusetts – which reached different outcomes – illustrate this point. In *Moning v. Alfono*, 254 N.W.2d 759, 774 (Mich. 1977), the Supreme Court of Michigan reversed a directed verdict for a slingshot manufacturer on a negligent entrustment claim. The plaintiff was a twelve-year-old boy who was struck in the eye when a pellet fired from his friend's slingshot ricocheted off a tree. The slingshot – a high-powered version "capable of launching projectiles at speeds

[17] The fact that Nancy Lanza bought the weapon for Adam, rather than him buying it himself, may be pertinent to a jury's proximate cause analysis; but it does not break the link between Remington and Adam because Adam Lanza is *exactly* who Remington was targeting and because he acquired the weapon in an entirely foreseeable manner. *See* FAC ¶¶ 153-55, 157-58, 220 (defendants know that firearms are routinely stored unsafely, are easily shared among family members and could "expect[]…that the possession and control of these weapons would be shared with and/or transferred to unscreened civilian users following purchase, including family members").

exceeding 350 miles per hour," *id.* at 771 – had passed from the manufacturer through a wholesaler and retailer before ending up in the hands of the plaintiff's friend. The manufacturer knew nothing about the characteristics of the child who bought the slingshot – or whether that particular slingshot would be purchased by a child at all. Nevertheless, the manufacturer's *encouragement of children* to buy its slingshots – as alleged by the plaintiff – made the final entrustment foreseeable, and thus actionable. And because the wisdom of marketing slingshots directly to children was not clear as a matter of law, the reasonableness of the manufacturer's entrustment required evaluation by a jury:

> [A] jury, applying the community's judgment of how reasonable persons would conduct themselves, should make the ultimate value judgment of the risks and the societal importance of the interests involved in marketing slingshots directly to children.

Id. at 763.

In contrast, in *Killeen v. Harmon Grain Products, Inc.*, 413 N.E.2d 767 (Mass. App. Ct. 1980), a manufacturer of flavored toothpicks who was not alleged to have played a role in enticing unsuitable buyers was *not* liable for negligent entrustment. The court noted that a viable claim "would involve the manufacturer's marketing its product, through advertising, packaging, or distribution, in a manner calculated to induce direct purchases by children or others whose use of the product would involve unreasonable risk of injury." *Id.* at 772-73.[18]

[18] While this Court does not have to follow Michigan and Massachusetts' reading of negligent entrustment law, a framework that focuses on the existence of a nexus between the defendant and the dangerous user – rather than the number of steps between them – avoids arbitrary distinctions. Presumably, if Remington targeted unsuitable users while selling AR-15s out of its own storefront, it would not protest that its sales were too attenuated. Why should the analysis be different simply because Remington relies on Camfour and Riverview to achieve the same result? *Moning*, moreover, is consistent with Connecticut law, which dictates that issues surrounding risk and foreseeability generally belong to the jury. *See generally*, *Vendrella v. Astriab Family Ltd. P'ship*, 311 Conn. 301 (2014); *Ruiz v. Victory Props., LLC*, 315 Conn. 320 (2015).

The First Amended Complaint exemplifies the type of negligent entrustment claim recognized in *Killeen* and applied in *Moning* – but with a significantly more dangerous product and a far more reckless form of inducement. Plaintiffs allege that Remington used marketing and product placement to purposefully target a "younger demographic of users" interested in the *most dangerous and lethal use* of their weapon. *See* A74-A76, FAC ¶¶ 75-92, 175; A87, *id.* Count I ¶ 219. Camfour and Riverview, with knowledge of that scheme – and undoubtedly pleased with its positive impact on sales – acted as middlemen. *See* A83, FAC ¶¶ 178, 182; A88-A89, *id.* Count II ¶¶ 213, 223-24; A89-A90, *id.* Count III ¶¶ 213, 223-25. The link between that conduct and dangerous users *just like* Adam Lanza creates a jury question as to whether the entrustment of the Bushmaster XM15-E2S was negligent.

C. The First Amended Complaint Adequately Alleges that Defendants Should Have Known Their Entrustments Created an Unreasonable Risk of Harm

The First Amended Complaint also adequately alleges the second element of a claim for negligent entrustment: the defendant "kn[ew] or "ha[d] reason to know" that the entrustment created an "unreasonable risk of physical harm." A264, Rest. (2d) § 390. The First Amended Complaint sets forth a host of factors that informed the defendants' knowledge of the risk created by their entrustments, including the inherent dangerousness of the Bushmaster XM15-E2S, the mismatch between that destructiveness and civilian uses of firearms, the lax environment into which it was sold, and a particularly devastating type of harm resulting from its misuse. *See* A72-A74, FAC ¶¶ 47-74; A75, *id.* ¶ 85; A76-A78, *id.* ¶¶ 93-115; A82, *id.* ¶¶ 167-70; *cf.* W. Page Keeton et al., *Prosser & Keeton on Torts* § 32, p. 182 (5th ed. 1984) (Knowledge "rests upon perception of the actor's surroundings, memory of what has gone before, and a power to correlate the two with previous experience.").

First, the allegations regarding the sheer destructive power of the Bushmaster XM15-E2S weigh heavily against taking this case away from the jury at the pleading stage. "[W]hat is reasonable depends in significant measure on the degree of harm that such an object likely poses." *Shirley v. Glass*, 308 P.3d 1, 9-10 (Kan. 2013) (holding that negligent entrustment defendant should be "held to the highest standard of reasonable care in exercising control over firearms"). As useful as *Moning* is as a framework for understanding plaintiffs' claims, there is no comparison, when evaluating the reasonableness of defendants' conduct, between the slingshot at issue there and an AR-15. Rather than a toy "capable of firing projectiles at 350 miles per hour," 254 N.W.2d at 774, we are talking about a weapon of war that unleashes 30 bullets in ten seconds, each one travelling at 2,700 miles per hour with the power to tear the human body to pieces. And instead of a child with impaired eyesight, there are twenty dead first graders whose bodies were riddled with bullets. *Cf. Slicer v. Quigley*, 180 Conn. 252, 271–72 (1980) (Bogdanski, J., dissenting), *overruled on other grounds*, *Ely v. Murphy*, 207 Conn. 88 (1988) (the common law rule of non-liability arising from the sale of liquor to an intoxicated person may have been appropriate "when the horse and buggy was a customary mode of travel" but "a machine . . . capable of producing mass death and destruction [is] vastly different").

Clearly, there are Americans interested in possessing this fearsome weapon for lawful purposes, notwithstanding its flaws in home defense and hunting. *See* A76-A78, FAC ¶¶ 93-115. But that interest cannot be deemed *as a matter of law* to outweigh a jury's assessment of the catastrophic risk that, in the hands of Remington's "younger demographic," it would be used in its assaultive capacity against an innocent and

defenseless civilian population, causing "more wounds, of greater severity, in more victims, in less time" and inflicting "maximum casualties before law enforcement was able to intervene." A74, FAC ¶¶ 72-73; A86, *id.* ¶ 215; *see also Moning*, 254 N.W.2d at 763 ("The interest of children in ready-market access to slingshots is not so clearly entitled to absolute protection in comparison with the interest of persons who face the risk thereby created as to warrant the Court in declaring, as a rule of common law, that the risk will be deemed to be reasonable.").[19]

It is another tenet of negligent entrustment law, moreover, that objects pose varying degrees of risk in different contexts. A truck is not particularly dangerous when driven on the public roads to move furniture, but it poses unique dangers at a football tailgate filled with intoxicated college students. *See* A396, *Short v. Ross*, 2013 WL 1111820, at *8 (denying motion to strike negligent entrustment claim against U-Haul because, although renter was competent, "the proposed environment [a tailgate] was pedestrian-dense, unregulated by the rules of the road and would contain a large number of individuals who had recently consumed alcohol"). The same piece of machinery that can be safely entrusted to one facility may be negligently entrusted to another. *See Fredericks v. Gen. Motors Corp.*, 48 Mich. App. 580 (1973) (plaintiff stated negligent entrustment claim against

[19] The Fourth Circuit, sitting en banc, made a similar point in upholding Maryland's ban on assault rifles and large-capacity magazines and finding that such weapons and magazines are not protected by the Second Amendment because they are functionally the same as the M16: "At bottom, the dissent concludes that the so-called popularity of the banned assault weapons — which were owned by less than 1% of Americans as recently as 2013 — inhibits any efforts by the other 99% to stop those weapons from being used again and again to perpetrate mass slaughters. We simply cannot agree." *Kolbe v. Hogan*, -- F.3d -- No. 14-1945, 2017 WL 679687, at *19 (4th Cir. Feb. 21, 2017) (en banc), A360-A361.

General Motors for selling a piece of machinery to a company with lax safety protocols);[20] *cf. Ruiz v. Victory Props., LLC*, 315 Conn. 320, 332 (2015) ("Although light bulbs and paper weights are [] inherently innocuous, it hardly would be prudent to discard a wheelbarrow full of them in the middle of a playground.").

In the military, the dangers inherent to the AR-15 are meaningfully mitigated through extensive protocols governing training, storage, safety, and evaluating the mental health of soldiers and officers. *See* A78-A80, FAC ¶¶ 116-43. The same is true for law enforcement. *See* A80, *id.* ¶¶ 139-43. But the civilian environment – where regulations are lax, enforcement is inadequate, storage is unsafe, guns change hands easily, and young men mesmerized by realistic "games" involving mass killing have easy access to weapons of *real* mass killing, *see* A80-A82, *id.* ¶¶ 144-165 – *augments* those dangers. That context, of which defendants are alleged to have been aware, A86-A89, *id.* ¶ 213, matters.

The fact that the defendants did not intend to facilitate a mass shooting is beside the point. "Negligence is conduct and not a state of mind." Keeton *et al.* at § 31, p. 169. Remington's *conduct* enticed and enabled a high-risk class of people to purchase or otherwise gain access to the industry's most efficient weapon of mass murder. Ultimately,

[20] *Collins v. Arkansas Cement Co.*, 453 F.2d 512 (8th Cir. 1972) also underscores this point. *Collins* affirmed a verdict against a cement manufacturer for negligently entrusting cherry bombs to its employees because "[n]o records were kept … of the bombs issued and no precautions were taken to insure that all of the bombs were used for business purposes or returned to the foreman for safekeeping." *Id.* at 513. Moreover, the foreman was aware that "employees were not faithful in returning the unused cherry bombs or were using them in horseplay around the plant." *Id.* at 514. Under those facts, the manufacture could have foreseen that one of the bombs would end up injuring someone outside the plant like the plaintiff, who was given a bomb by a group of children who had acquired it from an employee.

all three defendants chose to ignore the risk that entrusting a military-grade, "mission-adaptable" weapon to a "younger demographic of users" while promoting it through violent video games and declaring it capable of making "forces of opposition bow down," would attract the next Adam Lanza.

The trial court erred in deeming that conduct reasonable as a matter of law. "[T]he determination as to whether a particular risk is unreasonable is to be left to the jury when reasonable minds could reach different conclusions." *Vendrella v. Astriab Family Ltd. P'ship*, 311 Conn. 301, 336 (2014); *Moning*, 254 N.W.2d at 771 (it is the role of the jury, "applying the community's judgment of how reasonable persons would conduct themselves," that "should make the ultimate value judgment of the risks and the societal importance of the interests involved in [the defendant's conduct]").

Plaintiffs' allegations of defendants' knowledge concerning the unreasonable and extraordinary risk of harm created by their conduct are sufficient.

D. The First Amended Complaint Adequately Alleges that the Injuries Inflicted at Sandy Hook Were Foreseeable to Defendants

Finally, the First Amended Complaint adequately alleges the third element of a claim for negligent entrustment, foreseeability: the people harmed were those that "the supplier should expect to share in or be endangered by [the chattel's] use." A264, Rest. (2d) § 390. "[W]hether [an] injury is reasonably foreseeable ordinarily gives rise to a question of fact for the finder of fact," *Ruiz*, 315 Conn. at 330, and "the degree of foreseeability necessary to warrant [imposing liability] will ... vary from case to case," depending on the severity of the harm and how easily the defendant could have prevented it, *Vendrella*, 311 Conn. at 332 (internal citation and quotation marks omitted). As set forth in the First Amended Complaint, the harm resulting from a mass shooting like the one that claimed the lives of

plaintiffs' decedents is quite clearly "of the same general nature as the foreseeable risk created by the defendants[']negligence." *Ruiz*, 315 Conn. at 329.

The First Amended Complaint charges defendants with knowledge "of the unreasonably high risk that the XM15-E2S would be used in a mass shooting to inflict maximum casualties before law enforcement was able to intervene," and that "schools are particularly vulnerable to – and frequently targets of – mass shootings." A86, FAC Count I ¶¶ 215-16 (Remington); A88, *id.* Count II ¶¶ 215-16 (Camfour); A90, *id.* Count III ¶¶ 215-16 (Riverview). According to plaintiffs' allegations, the AR-15's fearsome assaultive capabilities, glorified by product placement in violent "shooter" video games favored by young males, rendered it the "weapon of choice" for lone gunmen seeking maximum carnage at the time the defendants entrusted the XM15-E2S. A68, *id.* ¶ 7; A75, *id.* ¶¶ 84-85; A82, *id.* ¶ 165.

By 2010, the risk of a mass shooting inflicted with an AR-15 like the Bushmaster XM15-E2S was not hypothetical to the defendants; it was a reality borne out by a litany of attacks, including attacks against children in schools. A82, FAC ¶¶ 167-70; *see also* A68, *id.* ¶ 7 ("Time and again, mentally unstable individuals and criminals have acquired an AR-15 with ease, and they have unleashed the rifle's lethal power into our streets, our malls, our places of worship, and our schools."). Compounding those allegations is the Remington Defendants' targeted marketing and product placement of the AR-15, which extolled the unrivaled assaultive capacity of the weapon in the hands of a lone gunman and gave them the "virtual" opportunity to experience first hand its killing power. *See* A74-A76, *id.* ¶¶ 75-92.

Foreseeability is not a static concept. Knowledge "rests upon … memory of *what has gone before*." Keeton et al. at § 32, p. 182 (emphasis supplied). Moreover, "evolving expectations of a maturing society [may] change the harm that may reasonably be considered foreseeable." *Vendrella*, 311 Conn. at 332 (quotation marks and citation omitted); *cf. Craig v. Driscoll*, 262 Conn. 312, 337–38 (2003), *superseded by statute* (noting, in recognizing negligence cause of action for providing liquor to an intoxicated person, that "we are mindful of the horrors that result from drinking and driving, horrors to which we unfortunately have grown more accustomed"). In light of plaintiffs' allegations, the foreseeability that defendants' entrustments would lead to a mass shooting in Connecticut involve questions of fact that cannot be resolved as a matter of law.

E. The Trial Court's Ruling is Flawed

The rationale of the lower court's dismissal of plaintiffs' negligent entrustment claims is contained in the following paragraph:

> The validity of [plaintiffs'] argument rests on labeling as a misuse the sale of a legal product to a population that is lawfully entitled to purchase such a product. Based on the reasoning from *McCarthy* [*v. Sturm, Ruger & Co.*, 916 F. Supp. 366 (S.D.N.Y. 1996), *aff'd sub nom McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997)], and the fact that Congress has deemed the civilian population competent to possess the product that is at issue in this case, this argument is unavailing. To extend the theory of negligent entrustment to the class of nonmilitary, nonpolice civilians – the general public – would imply that the general public lacks the ordinary prudence necessary to handle an object that Congress regards as appropriate for sale to the general public. This the court is unwilling to do.

MOD at 25 (footnote omitted). This was a deeply flawed ruling and should be reversed.

As an initial matter, the case law makes clear that a claim for negligent entrustment is *not* barred by the "legal" nature of the product; indeed, as demonstrated in the discussion above, most cases giving rise to a claim for negligent entrustment involve a lawful – yet

nevertheless unreasonable – entrustment. *E.g.*, *Moning v. Alfono*, 254 N.W.2d 759, 768 (Mich. 1977) (plaintiff stated negligent entrustment claim against defendants for marketing high powered slingshots to children, despite no law prohibiting it); *Short v. Ross*, 2013 WL 1111820, A391-A401 (rental of truck was lawful but complaint alleged negligent entrustment); *cf. McCarthy v. Olin Corp.*, 119 F.3d 148, 169–70 (2d Cir. 1997) (Calabresi, J., dissenting) ("There is all of the difference in the world between making something illegal and making it tortious. Making an activity tortious forces the people who derive benefit from it to internalize the costs associated with it, thereby making sure that the activity will only be undertaken if it is desired by enough people to cover its costs. It does not proscribe it altogether."). It is the *reasonableness* of Remington's entrustment to its target audience – the "younger demographic of users" – when selling a military weapon built for mass casualty assaults, that the negligent entrustment claims put at issue here. The lower court's disregard for plaintiffs' allegations – particularly those pertaining to Remington's marketing – cannot be squared with the deference the court was required to afford the First Amended Complaint on a motion to strike.

The court also erred in relying on *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997). *See* A154-55, MOD at 22-23; A157, *id.* at 25. *McCarthy* involved a mass shooting on a Long Island Railroad commuter train in 1993, in which the gunman used hollow point "Black Talon" bullets manufactured by Olin. The thrust of the district court and circuit majority opinions is that the manufacturer of Black Talons owed no duty to the victims of the shooting. But the reasoning behind that conclusion is distinguishable from the present case in three critical respects.

First, the plaintiffs in *McCarthy* did not assert negligent entrustment claims; they relied on a host of other claims sounding in negligence and strict liability. The court below made no mention of that obviously relevant distinction. Second, the *McCarthy* courts' refusal to impose a duty was based on New York law, which *does not allow consideration of foreseeability* when assessing the existence of a duty to the plaintiff. *See*, *e.g.*, *McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366, 369 (S.D.N.Y. 1996) ("The New York Court of Appeals has held that foreseeability must be distinguished from duty."); 119 F.3d at 156 ("Foreseeability 'is applicable to determine the scope of the duty—only after it has been determined that there is a duty'") (quoting *Pulka v. Edelman*, 40 N.Y.2d 781, 785 (1976)). Indeed, it was on this precise point that the district court in *McCarthy* distinguished and declined to follow the Michigan Supreme Court case, *Moning v. Alfono*:

> [T]he *Moning* court followed a different rule on the issue of duty than is applied in New York. Under Michigan law, the question of the existence of a duty depends in part on foreseeability. *Moning,* 400 Mich. at 439, 254 N.W.2d at 765. In contrast, as noted above, New York law considers issues of duty and foreseeability as distinct inquiries in negligence cases. As I must apply New York law, *Moning*'s finding of a duty based on considerations of foreseeability fails to carry the day.

916 F. Supp. at 370 (internal citation omitted). Connecticut law, however, is like Michigan, not New York – foreseeability is an *essential* element in determining the existence of duty. *See, e.g.*, *Ruiz v. Victory Properties, LLC*, 315 Conn. 320, 328–29 (2015). Put simply, the lower court stuck the First Amended Complaint based on an analysis that is fundamentally inconsistent with Connecticut law.

Finally, *McCarthy* is a creature of its time. It was decided *twenty years ago*, in pre-Columbine America. Not only was the LIRR shooting one of the first to penetrate the

national consciousness; it was the first (and only) to use Black Talon bullets.[21] The plaintiffs made no claim of specific knowledge that rendered the shooting foreseeable; they alleged simply that the manufacturer should have been aware that criminals *would be* attracted to the bullets. *McCarthy*, 119 F.3d at 156.

Had plaintiffs here alleged negligent entrustment of an AR-15 in 1990, when "mass shooting" and "school shooting" were not national colloquialisms, when "lockdowns" were not regular experiences at schools and universities, and when firearm advertising was radically different – *McCarthy* might be at least partially instructive. Unfortunately, that is not the world described in the First Amended Complaint.

V. PLCAA PRESERVES PLAINTIFFS' NEGLIGENT ENTRUSTMENT CLAIMS

PLCAA bars certain claims against gun companies and allows others to proceed. One of the claims it explicitly preserves is "an action against a [firearm] seller for negligent entrustment." 15 U.S.C. § 7903(5)(A)(ii); *see also Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135 n.6 (9th Cir. 2009) ("While Congress chose generally to preempt all common-law claims, it carved out an exception for certain specified common-law claims (negligent entrustment and negligence per se)."). PLCAA neither creates negligent entrustment liability, nor commandeers state common law. Rather, PLCAA adds a threshold inquiry: does the plaintiff's claim satisfy the elements set forth in PLCAA's definition of negligent entrustment? Conveniently, Congress' textual choices streamline that analysis: PLCAA's definition mirrors the elements from the Restatement. Because the First Amended

[21] By the time of the shooting, Black Talon bullets were once again exclusively available to law enforcement, having been withdrawn from the market "following public outcry." *McCarthy*, 119 F.3d at 152.

Complaint sufficiently alleges the elements of negligent entrustment under Section 390, and because each of the defendants is a licensed firearm seller, PLCAA is satisfied.

A. PLCAA's Plain Meaning Controls Its Interpretation

In evaluating plaintiffs' claims, the Court's analysis must be guided by the plain meaning of PLCAA. "With respect to the construction and application of federal statutes, principles of comity and consistency require us to follow the plain meaning rule for the interpretation of federal statutes because that is the rule of construction utilized by the United States Court of Appeals for the Second Circuit." *Dark-Eyes v. Comm'r of Revenue Servs.*, 276 Conn. 559, 571 (2006). That rule dictates: "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 189 (2d Cir. 2001) (quotation marks and citation omitted); *cf. Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.").

B. PLCAA Explicitly Preserves Common Law Negligent Entrustment

PLCAA defines its primary purpose as follows: "To prohibit causes of action against" firearm manufacturers and sellers "for the harm solely caused by the criminal or unlawful misuse of [a] firearm . . . when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1) (purposes section). As the word "solely" in that statement reflects, PLCAA is a balancing statute. It both limits the exposure of gun companies and preserves the rights of injured parties to seek redress when those companies share responsibility for injury and death caused by firearms.

The operative provisions of PLCAA effectuate that balance by preempting a broad category of lawsuits arising from the criminal misuse of firearms – a category referred to as a "qualified civil liability action" – while preserving certain claims that target wrongdoing in the manufacture, sale, and marketing of firearms. *See* 15 U.S.C. § 7903(5)(A). One of those preserved causes of action is "an action brought against a seller for negligent entrustment." *Id.* § 7903(5)(A)(ii). Notably, because PLCAA does not *create* negligent entrustment liability, *see id.* § 7903(5)(C) ("[N]o provision of this chapter shall be construed to create a public or private cause of action or remedy."), the preserved cause of action for negligent entrustment is that arising under state law. To this end, PLCAA codifies the essential elements of Section 390 of the Restatement. Thus, negligent entrustment means

> the supplying of a [firearm] by a seller for use by another person[22] when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

Id. § 7903(5)(B). This claim may proceed against any defendant that acts as a "seller," as that term is defined in PLCAA. *See id.* § 7903(5)(A)(ii); *id.* § 7903(6)(B).

Courts reviewing negligent entrustment claims in the context of PLCAA have noted the obvious: the definition "is substantially the same as the Restatement version." *Estate of Kim v. Coxe*, 295 P.3d 380, 394 & n.89 (Alaska 2013); *see also Gilland v. Sportsmen's Outpost, Inc.*, 2011 WL 2479693, at *12, A325 (noting that "[the PLCAA] definition is consistent with Connecticut law on negligent entrustment"); *Al-Salihi v. Gander Mountain,*

[22] PLCAA adds the word "person" to the Restatement's broader term, "another," but defines "person" equally broadly to include a "corporation, company, association, firm, … *or any other entity*." 15 U.S.C. § 7903(3) (emphasis supplied). Camfour and Riverview are thus "persons" to which a firearm may be negligently entrusted.

Inc., 2013 WL 5310214, at *12, A290 ("The PLCAA standard mirrors the standard for the tort of negligent entrustment under New York law[.][Citing § 390]"). This framework makes a great deal of sense. The Restatement is "the most widely accepted distillation of the common law of torts." *Field v. Mans*, 516 U.S. 59, 70 (1995). And Section 390 is the authoritative source of negligent entrustment law in nearly every state that recognizes the cause of action. *See West v. E. Tennessee Pioneer Oil Co.*, 172 S.W.3d 545, 555 (Tenn. 2005) ("In line with a majority of other states, this Court has previously cited section 390 with approval in defining negligent entrustment."); *Casebolt v. Cowan*, 829 P.2d 352, 358-59 (Colo. 1992) (collecting cases where states have "employed, approved, or adopted" Section 390).

C. The Meaning of "Use" in PLCAA's Negligent Entrustment Definition Is Broad

At the crux of the trial court's opinion – and central to the defendants' arguments below – was the meaning of the word "use" in PLCAA's negligent entrustment definition. *See* 15 U.S.C. § 7903(5)(B) (seller "knows or reasonably should know" that entrustee "is likely to…*use* [the firearm] in a manner involving unreasonable risk of physical injury to the person or others"). Defendants argued that "using" a firearm in that context refers exclusively to discharging it to cause harm. Though the trial court ultimately agreed (after an unwarranted and misguided review of legislative history[23]) that "Adam Lanza's use of

[23] The court purported to discern "the clear intent of Congress" from the testimony of legislators who *opposed* PLCAA. *See* A164-A168, MOD at 32-36 (quoting extensively from PLCAA's "dissenters"). Not only was review of legislative history unnecessary in the first instance, the U.S. Supreme Court has made clear that dissenting statements are not reliable *precisely because* they often overreach. "[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. *In their zeal to defeat a bill, they understandably tend to overstate its reach*. The fears and doubts of the opposition are no authoritative guide to the construction of legislation." *N. L.*

the firearm is the only actionable use," A168, MOD at 36, it correctly noted that defendants' reading was not only "narrow," it lacked textual support.[24] When "use" is given its "ordinary, contemporary, common meaning," *Perrin*, 444 U.S. at 42, it is clear that the conduct alleged by plaintiffs is encompassed within PLCAA's formulation of negligent entrustment.

Particularly relevant to this analysis is the U.S. Supreme Court's discussion of the word "use" in *Smith v. United States*, 508 U.S. 223 (1993), decided more than a decade before PLCAA was enacted. In *Smith*, the Court was asked to discern "the everyday meaning" of the word "use" after a criminal defendant challenged a penalty enhancement on the grounds that trading a firearm in exchange for drugs did not constitute a "use" of the firearm under the statute. *Id.* at 228. After consulting dictionary definitions and previous interpretations of the term, the Court concluded that the ordinary meaning of "use" is expansive, as urged by plaintiffs here:

> Webster's defines "to use" as "[t]o convert to one's service" or "to employ." Black's Law Dictionary contains a similar definition: "[t]o make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." Indeed, over 100 years ago we gave the word "use" the same gloss, indicating that it means "'to employ'" or "'to derive service from.'" Petitioner's handling of the MAC-10 in this case falls squarely within those definitions. By attempting to trade his MAC-10 for the drugs, he "used" or "employed" it as an item of barter to obtain cocaine; he "derived service" from it because it was going to bring him the very drugs he sought.

R. B. v. Fruit & Vegetable Packers & Warehousemen, 377 U.S. 58, 66 (1964) (emphasis supplied); *see also District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (legislative history "refers to the pre-enactment statements of those who drafted or voted for a law.").

[24] *See* A164, MOD at 32 (citations omitted): "Read in isolation, there is no indication that Congress intended to so limit the definition of the term. To the contrary, when Congress intended to specifically limit a definition, it did so by using more specific verbs, such as 'to sell'; to 'otherwise dispose of'; and 'to discharge.'"

Smith, 508 U.S. at 228-29 (citations omitted); *see also United States v. Vargas-Duran*, 356 F.3d 598, 603 (5th Cir. 2004) ("The overwhelming majority of authority on the plain meaning of 'use' contemplates the application of something to achieve a purpose.").[25]

Notably, *Smith* rejected the argument that the statute required proof that the firearm was used *as a weapon*:

> It is one thing to say that the ordinary meaning of "uses a firearm" *includes* using a firearm as a weapon, since that is the intended purpose of a firearm and the example of "use" that most immediately comes to mind. But it is quite another to conclude that, as a result, the phrase also *excludes* any other use. Certainly that conclusion does not follow from the phrase "uses ... a firearm" itself. As the dictionary definitions and experience make clear, one can use a firearm in a number of ways.

508 U.S. at 230 (emphases in original). Given that "the words 'as a weapon' appear[ed] nowhere in the statute," the meaning of "use" could not be so narrowed. 508 U.S. at 229.

When applied to PLCAA, the U.S. Supreme Court's analytical framework from *Smith* yields the same result – but with even greater clarity. Not only do "the words 'as a weapon' appear nowhere in the statute," the text of PLCAA as a whole makes it clear that "use" in the negligent entrustment definition *cannot* reasonably be read to mean "use as a weapon" or "use to cause injury." If Congress intended to limit negligent entrustment claims to scenarios where the firearm is directly entrusted to the person who causes harm, it would have signaled that by employing the term "misuse" or "criminal or unlawful misuse." We

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[25] This Court employed very similar reasoning when it was called upon to determine "the ordinary meaning" of the word "use" in the context of "using" a car. In *Aetna Life & Cas. Co. v. Bulaong*, 218 Conn. 51, 62 (1991), the Court reviewed Webster's definition of "to use" and relied on prior interpretations of the term, ultimately concluding that "using" a car is not restricted to operating it. "'Use' is to be given its ordinary meaning. It denotes the employment of the automobile for some purpose of the user. One may 'use' an automobile without personally operating it, as the term use is broader than operation." *Id.* at 63 (internal citations and quotation marks omitted) (finding that riding as a passenger in a car constitutes "using" the car).

know this is so because it is what Congress did *every time* it referred to the type of criminal activity underlying a "qualified civil liability action." *See* 15 U.S.C. § 7901(a)(3) (noting in the findings section that "lawsuits have been commenced . . . which seek money damages and other relief for the harm caused by the misuse of firearms"); *id.* at § 7901(a)(5) (finding that gun companies "should not be liable for the harm caused by those who criminally or unlawfully misuse firearms products"); *id.* at § 7903(b)(1) (purpose of PLCAA is to "prohibit causes of action against [gun companies] for the harm solely caused by the criminal or unlawful misuse of firearm products"); *id.* at § 7903(5)(A) (defining "qualified civil liability action" as any action "resulting from the criminal or unlawful misuse of a [firearm]"). Alternatively, Congress might have used the word "discharge" to manifest a narrowing intent, as it did in the provision governing product liability claims. *See id.* § 7903(5)(A)(v) (precluding a product liability claim where "the discharge of the [firearm] was caused by a volitional act that constituted a criminal offense"). But such limiting language simply does not appear in the definition of negligent entrustment.[26]

It is clear that Congress knew how to employ narrowing language when it sought to limit the universe of "uses" to which PLCAA refers, especially when intending to limit criminal uses. The failure to use such language with reference to negligent entrustment is

[26] Common sense also confirms a broader meaning of "use." Someone who makes a "straw purchase" – that is, purchases a firearm for a person who is prohibited from buying it themselves – is very likely using the weapon in a manner involving unreasonable risk of harm. In circumstances where the seller had reason to believe it was engaging in such a sale, PLCAA is no bar. *See Chiapperini v. Gander Mountain Co.*, 13 N.Y.S.3d 777, 788 (N.Y. Sup. Ct. 2014) (denying defendant gun store's motion to dismiss negligent entrustment claim because allegations that gun store should have known a straw sale was taking place was "not preempted by the clear language of the statute"). The lower court's narrow construction of PLCAA would preclude such a claim. *See* A168, MOD at 36.

significant. When "Congress uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 156 (2d Cir. 2013) (quotation marks and citation omitted); *cf. Milner v. Dep't of Navy*, 562 U.S. 562, 583 (2011) (holding that "law enforcement purposes" must be read to "involve more than just investigation and prosecution" because other parts of the statute "demonstrate [that] Congress knew how to refer to these narrower activities").[27]

D. Plaintiffs' Allegations Satisfy PLCAA

Plaintiffs' allegations conform to each of the elements set forth in PLCAA's negligent entrustment definition. First, each of the defendants is a seller of firearms within the meaning of PLCAA,[28] and is alleged to have sold the Bushmaster XM15-E2S. *See* A83, FAC ¶¶ 176, 178, 182. In making those sales, the defendants "used" or "employed" the Bushmaster rifle as an item for sale; they "derived service" from it in the form of payment. *See Smith*, 508 U.S. at 228-29. Whether that "use" "involve[ed] unreasonable risk of physical injury to . . . others," 15 U.S.C. § 7903(5)(B), is a question of fact. The First

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[27] There is an additional reason that the Court should avoid reading PLCAA restrictively absent clear Congressional intent: "Statutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles[.]" *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 127 (2d Cir. 2001).

[28] The Remington Defendants disputed this below, despite the First Amended Complaint's numerous allegations pertaining to their sales activities. *E.g.*, A69, FAC ¶ 19 (at all relevant times, Remington Arms Company, LLC manufactured and sold AR-15s); A82, *id.* ¶ 171 (Remington Defendants sell to wholesalers and dealers); *id.* ¶ 172 (Remington Defendants sell directly to prominent chain retail stores); A83, *id.* ¶ 176 (Remington Defendants sold the Bushmaster XM15-E2S to the Camfour Defendants). The trial court correctly found that "plaintiffs have sufficiently alleged that the Remington defendants qualify as sellers as defined by PLCAA." A161, MOD at 29.

Amended Complaint amply alleges that defendants should have known that their sale of the Bushmaster XM15-E2S – under all the circumstances present in 2010 – involved an unreasonably high risk that a member of Remington's "younger demographic" would seek out the weapon to use in a mass shooting. *See generally* Part IV.B-D, *supra*. Those allegations satisfy the Restatement – and PLCAA.

VI. PLAINTIFFS HAVE CUTPA STANDING UNDER THE PLAIN TEXT OF SUBSECTION 42-110g(a)

CUTPA deters predatory commercial conduct, shields Connecticut's inhabitants from unfair sales and marketing practices, and encourages private citizens to hold wrongdoers accountable. "The purpose of CUTPA is to protect the public from unfair practices in the conduct of any trade or commerce . . . ." *Willow Springs Condo. Ass'n., Inc. v. Seventh BRT Devel. Corp.*, 245 Conn. 1, 42 (1998). Defendants engaged in *exactly* the kind of unscrupulous commercial conduct that CUTPA is meant to protect against. Their conduct led to massive public injury, costing the lives of children and educators and devastating the community in which they lived. The Newtown families, who suffered the worst possible losses due to defendants' actions, are *exactly* who must bring suit to hold defendants accountable.

In their Motions to Strike, defendants raised a barrage of arguments against plaintiffs' CUTPA claims. They asserted that PLCAA does not permit plaintiffs' CUTPA claims, that CUTPA does not allow damages for personal injury or death; that plaintiffs' claims were product liability claims, not CUTPA claims; that plaintiffs' claims were untimely;

and that CUTPA's regulatory defense bars plaintiffs' claims. The trial court rejected all of these arguments. A169-A172, A175-A185, MOD at 37-40, 43-53.[29]

The trial court struck plaintiffs' CUTPA pleadings for one reason: plaintiffs do not allege they were in a consumer, competitor, or business relationship with defendants. A174, MOD at 42. The court recognized that the statutory language does *not* impose this requirement, *id*., but read *Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105 (2005), *cert. denied*, 547 U.S. 1111 (2006), and the Appellate Court's decision in *Pinette v. McLaughlin*, 96 Conn. App. 769, *cert. denied*, 280 Conn. 929 (2006), to nonetheless impose it.

Consequently, the only CUTPA issue presently before the Court is this: whether subsection 42-110g(a) requires a CUTPA plaintiff to allege that he or she has a consumer, competitor or business relationship with the defendant. Plain textual analysis of subsection 42-110g(a) answers that question conclusively – the Act contains no such requirement, and the imposition of such a requirement would frustrate CUTPA's remedial purpose. The statute provides that "[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of [an unfair trade practice]" may bring a CUTPA claim. A247, Gen. Stat. § 42-110g(a). This language means what it says: a CUTPA plaintiff is "any person" – not "any consumer, competitor or person in a business relationship with the defendant." A CUTPA plaintiff need only allege injury resulting from prohibited conduct to establish CUTPA standing, and plaintiffs have made such allegations.

[29] In preliminary counterstatements of issues filed in this Court, defendants indicated they may raise these failed arguments as alternate grounds for affirmance. To the extent defendants pursue any of these arguments, plaintiffs will address them in reply.

A. PLCAA Preserves Plaintiffs' CUTPA Claims

As a preliminary matter, plaintiffs' CUTPA claims are preserved by PLCAA. In addition to preserving common law negligent entrustment claims, PLCAA preserves state statutory claims, as long as the underlying statute is applicable to the sale or marketing of firearms. A240-A241, 15 U.S.C. § 7903(5)(A)(iii). As the trial court determined, A169-A172, MOD at 37-40, CUTPA's prohibition of abusive sales and marketing practices makes it an appropriate predicate statute.

The Second Circuit's construction of the predicate provision in *New York v. Beretta*, 524 F.3d 384 (2d Cir. 2008), is highly persuasive to the Court. *See Szewczyk v. Dept. of Soc. Servs.*, 275 Conn. 464, 475 (2005) ("[I]t is well settled that [t]he decisions of the Second Circuit Court of Appeals carry particularly persuasive weight in the interpretation of federal statutes by Connecticut state courts.") (internal quotation marks and citation omitted). *Beretta* demonstrates CUTPA is an apt predicate. Statutes that "courts have applied to the sale and marketing of firearms" are suitable predicates under PLCAA, *see Beretta*, 524 F.3d at 404, and Connecticut courts have applied CUTPA to claims concerning the sale and marketing of firearms, *see Salomonson v. Billistics, Inc.*, 1991 WL 204385, at *13-15, A388-A390 (applying CUTPA to transaction involving firearms); *see also Ganim*, 258 Conn. at 315-17, 334-36, 372-73 (2001) (addressing CUTPA claims based on firearms industry's marketing and sale of handguns). Statutes "that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms" are also appropriate predicates, *Beretta*, 524 F.3d at 404, and CUTPA clearly implicates the purchase and sale of all goods, including firearms, *see* A245, Gen. Stat. § 42-110a(4)

(trade and commerce defined to include advertising, distribution or sale of any commodity in this state).

In short, CUTPA is an appropriate predicate statute.

B. CUTPA's Standing Provision Means What It Says: A CUTPA Plaintiff Is Any Person Who Suffers Any Ascertainable Economic Loss As a Result of an Unfair Trade Practice

Standard of Review: Construction of General Statutes § 42-110g(a) "raise[s] questions of law," and review is plenary. *Ugrin v. Cheshire*, 307 Conn. 364, 379 (2012).

CUTPA confers the right to assert a claim to "[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by [§] 42-110b[.]" A247, Gen. Stat. § 42-110g(a). Plaintiffs, who have suffered catastrophic losses due to defendants' exploitative marketing and sale of AR-15s in Connecticut, have CUTPA standing.

Codified at General Statutes § 1-2z, the "plain meaning" rule establishes the primacy of statutory text. "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes." A244, Gen. Stat. § 1-2z. Only when the plain text leads to "absurd or unworkable results" will the Court consider looking beyond the statutory language. *Id.*; *see also Tuxis Ohr's Fuel Inc. v. Adm'r, Unemployment Comp. Act*, 309 Conn. 412, 421-22 (2013). The legislature additionally directs that CUTPA be construed so as to punish abusive commercial practices and remedy the losses they cause: "It is the intention of the legislature that this chapter [CUTPA] be remedial and be so construed." A246, Gen. Stat. § 42-110b(d).

Subsection 42-110g(a) describes CUTPA standing and so is the operative text for the Court's § 1-2z analysis. It provides in relevant part:

> Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages.

A247, Gen. Stat. § 42-110g(a).

The phrase "[a]ny person" rejects restriction. "[T]he word any in statutes is generally used in the sense of all or every and its meaning is comprehensive in scope and inclusive in range," as well as being "broad, rather than restrictive in scope." *Gipson v. Comm'r of Corr.*, 257 Conn. 632, 640 (2001) (citations and internal quotation marks omitted). The Court, moreover, has already construed "any person" in this subsection to have its broad, literal meaning: "If the legislature had intended to restrict private actions under CUTPA only to consumers or to those parties engaged in a consumer relationship, it could have done so by limiting the scope of CUTPA causes of action or the definition of 'person,' such as by limiting the latter term to 'any party to a consumer relationship.'" *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 497 (1995).[30]

The trial court struck the CUTPA claims because plaintiffs failed to allege a consumer, competitor, or business relationship with defendants. If the legislature had intended that the plaintiff class be so limited, it presumably would have written something like this:

> ~~Any person~~ **A consumer, business competitor**, **or other person in a business relationship with the defendant** who suffers ~~any ascertainable~~

[30] *Larsen* looked to the defendant's conduct – not the plaintiff's relationship to the defendant – to assess CUTPA standing. *See Larsen*, 232 Conn. at 491-99 (trial court erred in deciding standing by focusing on the employment relationship between the plaintiff and the defendant rather than on the defendant's unfair commercial activities); *Fink v. Golenbock*, 238 Conn. 183, 214 (1996) ("[I]t was not the employment relationship that was dispositive [in *Larsen*], but the defendant's conduct.").

> ~~loss of money or property, real or personal~~ **injury in his or her consumer transactions or business** as a result of the **defendant's** use or employment of a method, act or practice prohibited by section 42-110b, may bring an action. . . .

The legislature did not choose this course. CUTPA standing does not arise because the plaintiff wears a "consumer" or "business competitor" label. Instead, CUTPA standing comes from injury: subsection 42-110g(a) says that a CUTPA plaintiff is *anyone who suffers any ascertainable loss* due to an unfair trade practice. *See Abrahams v. Young & Rubicam, Inc.*, 240 Conn. 300, 306 (1997) (interpreting "as a result of" in subsection 42-110g(a) to require "a showing that the prohibited act was the proximate cause of a harm to the plaintiff.").[31]

Other CUTPA provisions confirm that the legislature meant what it said in subsection 42-110g(a). CUTPA has a remedial purpose: to protect the public from unfair commercial conduct. *See* A246, Gen. Stat. § 42-110b(d) (CUTPA's purpose is remedial); *Willow Springs*, 245 Conn. at 42 (CUTPA protects "the public" from unfair trade practices). CUTPA deputizes those injured by abusive commercial conduct, "encourag[ing] litigants to act as private attorneys general." *Thames River Recycling, Inc. v. Gallo*, 50 Conn. App.

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[31] This interpretive question is not unique to Connecticut. In *Maillet v. ATF-Davidson Co., Inc.*, 552 N.E.2d 95, 98-99 (Mass. 1990), the Massachusetts Supreme Court held that an employee of the purchaser of a product had standing to bring an unfair trade practices claim against the manufacturer because the unfair trade practices act conferred standing on "[a]ny person . . . who has been injured by another person's use or employment of any [unfair trade practice]. . . ." In *Hall v. Walter*, 969 P.2d 224, 237 (Colo. 1998), the Colorado Supreme Court confronted similar "any person" standing language and held that the provision required only proof of a causal connection and injury in fact is the appropriate boundary for statutory standing. In 1999, the Colorado legislature narrowed the standing language interpreted by *Hall*, underscoring the point that it is the legislature's role to determine whether to alter the statutory language. *See* A250, 1999 Colo. Legis. Serv. c. 188, § 1.

767, 794 (1998). The legislature's desire to encourage private enforcement was so strong that the statute breaks with the American fee rule and allows the court to impose a successful plaintiff's fees on the defendant. A247, Gen. Stat. § 42-110g(d). Consistent with these other textual choices, the legislature's decision to deputize "any person" yields a larger pool of private attorneys general to remedy abusive commercial conduct.[32]

If subsection 42-110g(a) named consumers who did *not* suffer injury as appropriate CUTPA plaintiffs, the plaintiff class would be overbroad. If it named *only* consumers (or *only* consumers, competitors, and those in business relationships with the defendant) who suffered loss due to prohibited conduct, some potential plaintiffs injured by CUTPA violations would not have standing, and commercial chicanery that caused real injury would be beyond the statute's reach. The flexible but precisely delineated class of plaintiffs who are actually injured due to entrepreneurial abuses – in other words, the plaintiff class defined by our statute's plain text – best serves the statute's remedial purpose. The plain

[32] Since there is no ambiguity in the text of subsection 42-110g(a), § 1-2z directs the Court not to refer to CUTPA's legislative history. *See* A244, Gen. Stat. § 1-2z. In any event, the legislative history emphatically confirms that the text means what it says. *See* A249, Public Acts 1979, No. 79-210 (eliminating a privity requirement); A280-A281, Conn. Joint Standing Committee Hearings, Judiciary, Pt. 4, 1979 Sess., pp. 1159-60, Remarks of AAG Reinger ("The amendment will now allow a suit by any person who suffers any ascertainable loss of money or property. Numerous arguments have been raised in both state and federal courts that the plaintiff, in order to sue, must be a purchaser or a lessee of a seller or lessor. Clarification of Section 42-110[g(a)] is essential in order to avoid needless litigation of the particular phrase now found in the statute"); A278, 145 S. Proc., Pt. 8, 1979 Sess., p. 2575, Remarks of Sen. Casey ("The Attorney General's office is hampered in this enforcement effort by limited staff. Private litigation under this act is essential . . . ."); *see also* A274, H.R. Proc., Pt. 6, 1976 Sess., p. 2191, Remarks of Rep. Ferrari ("The purpose of this act is to stop unfair or deceptive practices. The only way to accomplish that effectively is to encourage litigation by private parties.").

meaning rule accordingly requires that the Court give effect to CUTPA's standing provision as it is written.

C. Plaintiffs Allege the Elements Required by Subsection 42-110g(a) for CUTPA Standing

Plaintiffs here allege the elements necessary under subsection 42-110g(a): they suffered ascertainable financial loss as a result of defendants' unfair trade practices. Defendants' unscrupulous marketing and sale of the XM15-E2S lies within the core of the entrepreneurial conduct to which CUTPA applies. Indeed, CUTPA defines "[t]rade" and "commerce" as "the advertising, the sale . . . , the offering for sale . . . , or the distribution of . . . any property . . . , and any other article, commodity, or thing of value in this state." A245, Gen. Stat. Ann. § 42-110a. Plaintiffs' detailed factual allegations support the conclusion that defendants violated CUTPA,[33] and that their actions led to terrible injuries.[34]

Defendants knew how AR-15s work – AR-15s are supremely efficient mass killers, even in the hands of a relatively untrained shooter. *See* A69, A72-A74, A86, FAC ¶¶ 9-10, 47-74, 213. Deployed against a crowd, the AR-15 does not take one life, it takes many.

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[33] Plaintiffs' CUTPA claims assert violations of public policy and unscrupulous, immoral, and unethical conduct. (The CUTPA claims, however, are not premised on deception in any respect.) Because defendants have never briefed a challenge to plaintiffs' CUTPA allegations under the cigarette rule, plaintiffs do not brief the cigarette rule here.

[34] Physical injuries constitute serious consumer injury for purposes of CUTPA. *See* A246, Gen. Stat. § 42-110b(b) (directing the Court to be guided by Federal Trade Commission decisions when construing CUTPA); *see also, e.g.*, *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1064 (1984) (confirming finding of unfairness based on sale and marketing of tractors that geysered hot fuel). "Unwarranted health and safety risks may also support a finding of unfairness." *Id.* at 1073; *see also In re Uncle Ben's, Inc.*, 89 F.T.C. 131, 136 (1977) (banning television ad showing child cooking without adult supervision, due to danger children would imitate it); *In re Philip Morris, Inc.*, 82 F.T.C. 16, 19 (1973) (barring respondent from distributing free-sample razor blades in a way that might reach small children).

See A68, A73, *id.* ¶¶ 7, 56, 61. Defendants knew how fast AR-15s kill, A74, A86, *id.* ¶¶ 67-74, 213 – and so they knew that if a shooter with an AR-15 attacked a school, and their product functioned exactly as designed, lockdowns and 911 calls would not save the first twenty or thirty or forty children. This was not theoretical, "should have known" awareness that a shooter with an AR-15 *might* attack an American community some day. Defendants knew that AR-15s were used repeatedly, regularly, and routinely, to mass kill Americans well before Sandy Hook. A82, A86, *id.* ¶¶ 168-70, 213.

Despite what they knew about the AR-15's lethality, and its repeated use in mass killings, defendants continued to sell AR-15s such as the XM15-E2S in Connecticut. Defendants' marketing strategy was that purchasers of their AR-15s would share possession of the weapon with other family members, A90, FAC ¶ 219; *see also* A81, A86, *id.* ¶¶ 153, 158, 213, meaning that defendants intended to profit from the circumvention of background screening laws. And they marketed their AR-15s to civilian buyers by invoking the gun's *offensive* military value. *See* A74-A75, A82, *id.* ¶¶ 76-82, 175. These promotion and sales tactics violated CUTPA and were a substantial factor leading to the deaths of children and educators whose families now bring suit. A87-A89, *id.* ¶¶ 226-29.

Plaintiffs are not required to allege a consumer, competitor, or business relationship with defendants, and these allegations suffice to establish CUTPA standing. The trial court's ruling striking the CUTPA claims must be reversed and the claims reinstated so the parties can proceed with discovery.

D. The Court Has Already Held that the Requirement of Direct Injury, A Requirement Plaintiffs Satisfy, Circumscribes CUTPA Standing

The plain text of subsection 42-110g(a) keys CUTPA standing to injury, a very familiar linkage. One construction of subsection 42-110g(a) would read it as creating a

plaintiff class so broad that even those indirectly injured but still suffering ascertainable loss could bring suit. The Court rejected that construction in *Ganim*, 258 Conn. at 313, holding that direct injury, as that requirement is defined in prudential standing analysis, limits CUTPA standing, *see id.* at 373.

In *Ganim*, the City of Bridgeport asserted CUTPA claims against firearms makers whose sales practices were causing an epidemic of gun violence. To determine whether Connecticut courts had subject matter jurisdiction over the City's claims, the Court assessed whether the City asserted a colorable claim of direct injury. *See Ganim*, 258 Conn. at 346 ("Our standing jurisprudence consistently has embodied the notion that there must be a colorable claim of a direct injury to the plaintiff, in an individual or representative capacity."). The Court rejected the notion that CUTPA as defined by subsection 42-110g(a) reaches beyond the bounds of prudential standing: "We conclude that the ascertainable loss requirement of CUTPA does not displace the remoteness doctrine as a standing limitation, and that the same reasons of remoteness and derivativeness that we have explained earlier apply to the CUTPA claim." *Ganim*, 258 Conn. at 372.

Ganim speaks even more specifically to the standing of primary victims of gun violence to proceed against the firearms industry. The policy concerns that cut against standing when a party is only indirectly injured disappear when a party is the primary victim of wrongdoing:

> First, the more indirect an injury is, the more difficult it becomes to determine the amount of plaintiff's damages attributable to the wrongdoing as opposed to other, independent factors. Second, recognizing claims by the indirectly injured would require courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, in order to avoid the risk of multiple recoveries. *Third, struggling with the first two problems is unnecessary where there are directly injured parties who can remedy the harm without these attendant problems.*

Ganim, 258 Conn. at 353 (emphasis supplied). The City of Bridgeport did not have standing because its claims were largely derivative of the claims of the "primary victims" – "all the homeowners in Bridgeport who have been deceived by the defendants' misleading advertising, all of the persons who have been assaulted or killed by the misuse of the handguns, and all of the families of the persons who committed suicide using those handguns." *Id.* at 359. These "primary, and not remote, victims of the defendants' misconduct" potentially would have standing to proceed. *Id.* at 361.

The Sandy Hook families are "primary, and not remote" victims of defendants' wrongdoing. Defendants – who have made innumerable attacks on plaintiffs' CUTPA claims – have *never* argued the contrary. Denying defendants' motions to dismiss, which wrongly asserted that CUTPA statutory standing is jurisdictional, the trial court observed: "[t]he defendants do not argue . . . that the plaintiffs lack standing under CUTPA because their injuries are too indirect, remote, or derivative." A125, MOD on Mot. to Dismiss at 16. Thus, in addition to alleging the requirements of subsection 42-110g(a), plaintiffs allege facts that satisfy *Ganim*'s direct injury requirement.

Ganim's imposition of a direct injury requirement on subsection 42-110g(a) should greatly influence the Court here, because that ruling lays to rest any real concerns that applying the plain language of subsection 42-110g(a) would lead to absurd or anomalous results. Thus, in *Vacco v. Microsoft Corp.*, 260 Conn. 59, 88 (2002), the Court observed that "it strains credulity to conclude that CUTPA is so formless as to provide redress to any person, for any ascertainable harm, caused by any person in the conduct of any trade or commerce." (internal citation and quotation marks omitted). *Vacco* then indicated that the Court's prior jurisprudence *had addressed this concern* by applying "traditional common-

law principles of remoteness and proximate causation to determine whether a party has standing to bring an action under CUTPA." *Id.* In support of this conclusion, *Vacco* lists *Ganim*, 258 Conn. at 372-73, as the first example. *Vacco*, 260 Conn. at 88.[35] In short, because plaintiffs satisfy the direct injury requirement and allege a causal nexus between defendants' wrongdoing and their injuries, there is no principled reason to foreclose their right to bring CUTPA claims.

E. *Ventres* Did Not Decide the Scope of CUTPA Standing

Despite the plain language of subsection 42-110g(a), the trial court concluded that *Ventres v. Goodspeed Airport, LLC*, 275 Conn. at 157-58, and *Pinette v. McLaughlin*, 96 Conn. App. at 769, required it to strike the CUTPA allegations, because plaintiffs had not alleged they were in a consumer, competitor, or business relationship with defendants. A173-A174, MOD at 41-42. *Ventres* does not so hold. And *Pinette* is wrongly decided.

If *Ventres* had indeed conclusively construed the meaning of subsection 42-110g(a), it would have done two things. First, it would have done the textual analysis required by § 1-2z.[36] *Ventres*, however, does not even cite subsection 42-110g(a), let alone engage its plain meaning. Since *Ventres* does not even engage with the CUTPA's standing provision, it should not be reaching a conclusion about the scope of CUTPA standing. Even if *Ventres* had engaged in plain meaning analysis – which it did not –a construction adding requirements inconsistent with

[35] Vacco also lists two CUTPA causation/standing cases, *Abrahams*, 240 Conn. at 306-08; and *Haesche v. Kissner*, 229 Conn. 213, 222-24 (1994), in support of this conclusion.

[36] Section 1-2z was enacted in 2003, two years before *Ventres* was decided. To the extent the *Ventres* Court intended to determine the meaning of § 42-110g(a), it was required to address the provision's plain language.

CUTPA's text would have been error. "[C]ourts must interpret statutes as they are written . . . and cannot, by judicial construction, read into them provisions which are not clearly stated . . . ." *PJM & Assocs., LC v. Bridgeport*, 292 Conn. 125, 138 (2009) (quotation marks and citations omitted).

And second, if *Ventres* were narrowing CUTPA standing, it would have explicitly addressed and distinguished the Court's prior analyses of subsection 42-110g(a), because it would have been altering the course of the Court's CUTPA jurisprudence. It is worth reviewing a few of these authorities, because they so strongly confirm the primacy of CUTPA's remedial purpose and subsection 42-110g(a)'s text in determining CUTPA standing. In *Larsen*, 232 Conn. at 497, the Court held that "any person," as used in subsection 42-110g(a) and defined by subsection 42-110a(3), did not mean "any consumer." *See also McLaughlin Ford, Inc. v. Ford Motor Co.*, 192 Conn. 558, 566-67 (1984) ("The General Assembly has not seen fit to limit expressly the statute's coverage to instances involving consumer injury, and we decline to insert that limitation.").[37] In *Hinchliffe v. Am. Motors Corp.*, 184 Conn. 607, 615 (1981), the Court construed "ascertainable loss" to have a broader meaning than "actual damages" in order to effectuate the private remedy provided by CUTPA. And in *Abrahams*, 240 Conn. at 306-07, the Court looked to the causal language ("as a result of") in subsection 42-110g(a) to inform CUTPA standing. *Ventres* does not discuss any of these intrepretations of subsection 42-110g(a), though all of them — and many more decisions — would have been implicated if the Court were narrowing the scope of CUTPA standing.

[37] In fact, *Ventres* cites *McLaughlin* without distinguishing it. *Ventres*, 275 Conn. at 105.

It is true that the land trust parties in *Ventres raised* the argument we make here. *Ventres*' response is somewhat ambiguous, but the most sensible reading is that the Court did not decide the argument because it had been inadequately briefed: "The land trust [parties] argue, alternatively, that a CUTPA plaintiff is not required to allege any business relationship with the defendant. *They have provided no authority, however, for that proposition*. . . . Accordingly, we reject this argument." *Ventres*, 275 Conn. at 157-58 (emphasis supplied); *see also, e.g.*, *Connecticut Light & Power Co. v. Gilmore*, 289 Conn. 88, 124 (2008) ("We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . ").

In fairness to the trial court, *Pinette*, 96 Conn. App. at 778, the other case on which it relied, misreads *Ventres*. *Pinette* determined that a guest injured by a landlord's unfair trade practice could not assert a CUTPA claim against the landlord – even though other case law establishes that a tenant hurt by the same prohibited conduct could. *Pinette* finds that this Court "has indicated that a plaintiff must have at least *some* business relationship with the defendant in order to state a cause of action under CUTPA," *id.*, relying on *Ventres* and *Vacco*. *Ventres* does *not* hold that the plaintiff must allege a business relationship with the defendant to have CUTPA standing. And *Vacco* indicates that the Court *has addressed* its concern about formlessness by applying direct injury and traditional proximate cause principles to assess CUTPA standing. *Vacco*, 260 Conn. at 88. *Pinette* should be overruled.

VII. CONCLUSION

The judgment below must be reversed, and the case remanded so that the parties may engage in discovery and proceed to trial.

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CERTIFICATION OF SERVICE AND COMPLIANCE

I hereby certify, on this 1st day of March, 2017, the following:

1. The Brief and Appendix comply with the format requirements of Rule of Appellate Procedure § 67-2;

2. The printed Brief and Appendix were mailed postage prepaid to:

   The Honorable Barbara Bellis
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   1061 Main Street
   Bridgeport, CT 06604

3. The Brief and Appendix have been redacted and do not contain any names of other personal identifying information that is prohibited from disclosure.

4. The printed Brief and Appendix are true copies of the Brief and Appendix that were submitted electronically.

5. Pursuant to the requirements of Rule of Appellate Procedure § 62-7, the electronically filed Brief and Appendix were delivered electronically to the last known e-mail address of each counsel of record and paper copies of the Brief and Appendix were mailed, postage prepaid, to:

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